

# Professional indemnity insurance considerations when adopting modern methods of construction

**Claire Meade and Stephen Hargreaves** of insurance broker **Griffiths & Armour** provide an update on insurers' attitudes to MMC and implications for designers' insurance policies.

Modern methods of construction (MMC), a wide term covering a range of off-site and on-site techniques, offers alternatives to traditional methods and has the potential to deliver significant improvements in productivity, efficiency and quality<sup>1</sup>.

Off-site, factory production of the individual parts of buildings is a common feature of MMC, along with timber-framing and recycling, with the use of digital technologies being of central importance. MMC techniques are often cited as being crucial in helping to address several problems. From being able to build more quickly, particularly important in the residential sector, to improving quality and addressing sustainability concerns, the effective use of MMC may prove to be helpful in each case.

However, there are barriers across the industry to the increased use of MMC, including higher associated costs, as well as a lack of a cohesive link between off-site and on-site methods, which can lead to a disconnect between what has been manufactured in the factory and what occurs on-site<sup>2</sup>.

This article aims to consider another perceived barrier: professional indemnity (PI) insurance considerations as to the use of MMC.

## What's the view from PI insurers?

New and innovative solutions will be vital for the UK's transition to net zero and the insurance industry has a key role to play in this. At board level, it is the case that insurers are starting to put in place strategies to support greener solutions. However, the concern for individual PI underwriters is that these new, innovative solutions will bring new and currently unknown risks which will sit with the professionals that they insure.

Forward-thinking insurers are beginning

to look ahead, to try to understand what they need to do in order to fully understand the risk that they are underwriting. It may be that significant changes are needed to the questions insurers ask about your business. For instance, in addition to asking about the experience of the designer and their role, it would seem important for the underwriter to ask about the experience of the on-site workers, as well as considering what procedures are in place to mitigate risk, particularly at the crucial off-site/on-site interface.

Similarly, insurers may require comfort around the quality control measures and procedures in place at manufacturing facilities, and the logistics of transporting modules from those facilities and what mitigations are in place to minimise any disruption.

PI pricing and rating models may need to be adapted as more MMC is used and design is standardised. Indeed, when it comes to unlocking the challenges of collaboration highlighted in many studies, PI itself may need to be replaced with an alternative insurance product.

However, we're not at that stage yet. If we consider your current disclosure requirements, it's unlikely that proposal forms and associated questionnaires will ask specifically about the use of MMC. Nonetheless, there are obligations on those taking out insurance to make a fair presentation of their risk to the insurers. This will include providing the insurer with notice of any material circumstance, i.e. something which would influence the insurer's decision as to whether to agree to provide insurance and, if so, the terms of that insurance.

An increased use of MMC techniques could be something which would alter the insurer's assessment of your individual risk; therefore, a discussion with your broker as

to whether this is something which should be specifically disclosed to your insurers is a wise step to protect your position.

Overall, there is a need for greater dialogue between the construction and insurance sectors to build understanding of new risks and how they will be managed. Only through this process can individual underwriters then apply this knowledge when it comes to considering individual renewal terms for their insureds.

## What PI risks should you be aware of?

Given the long-tail nature of PI claims, it's difficult at this point in time to identify specific 'trends' relating to MMC. However, we can look at some more general risks and how to manage these.

One recurring theme that has given rise to high-value claims in recent years is the extent of designers' reliance on software to produce design solutions which, as it turns out, contain errors, usually because there was an error in the data input. While it was, therefore, a human error that caused the problem, equally only human intervention in the form of checking could have detected those errors.

That erosion of human input into the design process undoubtedly delivers cost savings and efficiencies into the process, and the same can surely be said for construction techniques which, for example, use robots to lay bricks rather than employing a team of labourers. It is to be hoped that those responsible for activities on-site will similarly keep a watchful human eye on what the automatons are turning out, rather than relying entirely on the technology to get it right every time. Will professionals with a site role be exposed in the future to allegations that they should have noticed something going awry in this regard?



## PI PRICING AND RATING MODELS MAY NEED TO BE ADAPTED AS MORE MMC IS USED AND DESIGN IS STANDARDISED

Similar considerations apply in relation to the use of ‘new’ materials which may be cheaper and more environmentally friendly, but which may compromise the design life (as has been the case with reinforced autoclaved aerated concrete, or RAAC) or which otherwise prove to be inferior if used in the wrong context.

Our current experience of how fire safety disputes are playing out reflects what experienced PI practitioners already understand about how those who didn’t regard themselves at the time as being directly responsible for a design decision end up having a share of liability apportioned to them.

This is nothing new in principle and it flows from the collaborative way in which construction teams operate. More specifically, however, it echoes a wider recurring theme about how designers are often pressed into ‘agreeing’ to the use of an alternative product proposed by a specialist subcontractor or supplier. When the product fails, the well-insured designer is exposed to at least a degree of liability.

Furthermore, if there is a proposal for materials to be reused, then someone on the team must take responsibility for assessing whether this design decision involves a compromise in quality. That someone could end up being the consulting engineer by default unless the relevant appointment agreement specifically says otherwise.

With regards to reuse of designs themselves, it is important to be aware that under PI policies, there is generally a provision that states that errors relating to the same originating cause will be subject to one limit of indemnity. So, if there is a design error that is then replicated a number of times, there is likely to only be one limit of indemnity to meet any number of related claims. As a result, requests for designs to be reused should be considered carefully and with the appropriate protective provisions included in your contracts.

What we can say with some certainty is that MMC projects can also still be impacted by ‘normal’ PI claims and robust internal risk management processes are important to try and mitigate any associated risks.

### What can you do to protect your position?

It’s clearly important to work with a project team who have the appropriate skills required for MMC projects. The inclusion

of a net contribution clause, i.e. a clause that aims to limit your liability to your just and equitable share in the event of a loss, becomes all the more important to avoid picking up liability for the actions of other members of the project team, given that you typically have no control over their selection.

Without such a clause, you are likely to be jointly and severally liable to your employer, meaning they can claim against all of the project team or just one team member to recover all of the losses suffered.

It’s difficult to resist observing that the risk of insolvency is greater where other members of the project team are finding their way with new products or revenue streams, and MMC will feature among them for some businesses. The risks for professionals of joint and several liability are exacerbated in financial terms when other parties who bear responsibility for loss go bust or are uninsured.

As well as defining your role in assessing the design and ensuring there are no scope gaps, inspection could also be an important area to focus on and for which to carefully define your role and obligations. For MMC projects, this may involve not only making periodic visits to site but also visiting manufacturing premises.

Make sure that your appointment records specifically how often you are to attend and what specifically you will be looking for during any inspection – are you there simply to monitor progress or to check for quality and/or compliance with drawings (in which case have you priced not only for the time involved in deploying a sufficiently experienced member of your staff but also for the potential consequences of that individual failing to spot a quality issue)?

Overall, in addition to any ‘new’ risks, it is still important to bear in mind the usual risk management considerations that you would have for any traditional project, such as:

- negotiating an appropriate fee for the services required
- adequately resourcing the job
- having a clear brief and then adhering to it – don’t allow yourself to be dragged into taking responsibility for areas that you never intended should fall to you, and clarify this with express contractual exclusions or other appropriate wording if need be
- investing time in the contract terms as these will be critical should a dispute arise.

### Managing risk and contractual liability

An earlier series from Griffiths & Armour, on ‘Managing risk and contractual liability’, looks in more detail at a number of topics raised in this article, such as scope of work, contractual terms, liability, indemnity clauses and net contribution clauses.

Find all the articles in the series at [www.istructe.org/thestructuralengineer/article-series/managing-risk-contractual-liability](http://www.istructe.org/thestructuralengineer/article-series/managing-risk-contractual-liability).

### Conclusions

The consequences of a failure directly resulting from MMC techniques are likely to be different from losses connected to a traditional build project. However, insurers do not have the data yet to support exactly what these will be. As a result, we would expect insurers’ views to develop over time, as their experience in underwriting these new risks grows and any claims trends are identified. We would recommend you work with your broker to keep them updated on your activities so they can present this to your insurers as required, considering your individual circumstances.

Griffiths & Armour is a leading independent insurance broker and risk management adviser specialising in professional indemnity insurance for construction professionals. For further information, visit [www.griffithsandarmour.com](http://www.griffithsandarmour.com). Griffiths & Armour is authorised and regulated by the Financial Conduct Authority.

### REFERENCES

- 1) **Government Commercial Function (2022)** *Modern methods of construction: guidance note* [Online] Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1102387/20220901-MMC-Guidance-Note.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1102387/20220901-MMC-Guidance-Note.pdf) (Accessed: January 2024)
- 2) **Peters S., Pinkse J. and Winch G. (2023)** *Driving change in UK housing construction: a Sisyphean task?* Productivity Insights Paper No. 017, The Productivity Institute [Online] Available at: [www.productivity.ac.uk/research/driving-change-in-uk-housing-construction-a-sisyphean-task](http://www.productivity.ac.uk/research/driving-change-in-uk-housing-construction-a-sisyphean-task) (Accessed: January 2024)